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No. 04-1009

Supreme Court, U.S.
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In the
Supreme Court of the United States

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS AFFILIATED LOCAL 6000, . .

Petitioners,

v

DAVID FINK, JANET OLSZEWSKI, PATRICIA L. CARUSO, THOMAS D. WATKINS, JR., THOMAS G. CUTLER,

Respondents,

JAMES D. FARRELL,

Respondent-Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

I. Under the Fourth Amendment, the federal courts have recognized that public sector employees may be subject to random drug and alcohol testing. In a facial constitutional challenge, does a narrow and specifically tailored random-based-selection testing program implemented for state employees occupying test-designated positions serve the substantial public interest in protecting the health and safety of the public, fellow employees, and the vulnerable populations under the jurisdiction of the state agencies sufficient to override the minimal intrusion on the Fourth Amendment rights of these state employees?

II. Some showing of drug and alcohol abuse in the work place may shore up an assertion of a special need to justify a random drug and alcohol testing program. In a facial constitutional challenge, does a narrowly and specifically tailored random-based-selection testing program comply with the Fourth Amendment where evidence of historical drug and alcohol work-related incidents existed although there is no evidence of a pervasive or particularized problem?

PARTIES

Respondents agree with Petitioners' summary of the parties with one exception. John F. Lopez, as the State Personnel Director charged with administrating the Michigan Civil Service Commission's random drug and alcohol testing program, intervened as a defendant in the district court and filed as an appellee in the Sixth Circuit. James D. Farrell has recently been appointed the State Personnel Director and thus, should be substituted as a respondent. Rule 35.3.

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OPINIONS BELOW

Petitioners properly state that the decision of the Sixth Circuit Court of Appeals is reported at 385 F.3d 1003 (6th Cir. 2004.) The United States District Court for the Western District of Michigan, however, issued two decisions that are reported at Opinion of United States District Court, Docket No. 5:00-CV-21, 2001 U.S. Dist. LEXIS 4560 (March 30, 2001), Resp. App. 1b-15b, and 336 F. Supp. 2d 686, (W.D. Mich., 2003.)

JURISDICTION

Respondents agree with Petitioners' jurisdiction statement.

STATEMENT OF THE CASE

Respondents (State Officials) implement a random drug and alcohol testing program (program) for selected positions within the state's classified civil service where incumbents of the positions perform safety sensitive functions for the vulnerable populations under the state's jurisdiction. These employees also hold positions in a highly regulated environment. The state's program replicates the existing programs implemented in the federal government. Petitioners claim the program violates the Fourth Amendment because prior testing by the state did not evidence a pervasive or particular drug and alcohol problem and the testing is performed on a random rather than a selected basis.

A. The Michigan Civil Service Commission Adopted A Random-Based-Selection Drug and Alcohol Program

Under Michigan's Constitution, Mich. Const. 1963, art. 11, § 5, the Michigan Civil Service Commission (Commission) has the power to regulate the terms and conditions of employment for the State's civil service. In 1999, the Commission adopted a random-based-selection drug and alcohol testing program (program) for state employees who held positions where the duties included protection of the health and safety of the public and aid to the vulnerable populations under the jurisdiction of the state. 6th Cir. Jt. Apx. 94 Stip. ¶ 41; 97 Stip. ¶¶ 51-52; 108 Stip. ¶ 89; Pts. App. 36a-37a. Petitioners represent approximately 20,000 state positions, of which 2,855 positions are subject to such testing.[1] 6th Cir. Jt. Apx. 86 Stip. ¶3; 105 Stip. ¶¶78-79; 106 Stip. ¶¶ 83-84.

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[1] At the time of the entry of the Stipulation, State Officials test designated 2858 positions represented by Petitioners. 6th Cir. Jt. Apx. 106-107, Stip. ¶¶83-84. By the time the district court held oral arguments, the physicians' positions had been abolished and were no longer represented by Petitioners. Thus, 2855 positions remained as test-designated at the time the lower court decisions were rendered.

1. The Commission Incorporated A Previously Adopted Program in Agreement Between Petitioners and State.

The Commission incorporated this program into the 1999-2001 Collective Bargaining Agreement (Agreement) between Petitioners and the State of Michigan. Article 52 of the Agreement identified seven position categories that required employees to perform duties that had a significantly greater threat to the health and safety of the public, fellow state employees, and others, than those duties performed by other classified employees. Pet. App. 36a-44a. For example, these duties may require an employee to react to unusual or dangerous circumstances and avoid serious consequences due to errors in judgment. In these situations, substance abuse by certain state employees poses a more significant threat than for employees in other classified positions. 6th Cir. Jt. Apx. 96 Stip. ¶ 49; 401. The 2855 positions represented by Petitioners fit within four of the seven test-designated categories of duties:

> Category 2: A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty;
>
> Category 3: A position in which an employee on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions;
>
> Category 4: A position in which an employee has regular unsupervised access to and direct contact with prisoners, probationers, or parolees; and
>
> Category 5: A position in which an employee has unsupervised access to controlled substances. [6th Cir. Jt. Apx. 105 Stip. ¶¶ 81-82; Pts. App. 37a, Agreement, Art. 52, § 1(h).]

Petitioners stipulated that the test-designated positions occupied by these employees performed duties in varying amounts, within one of the four categories. 6th Cir. Jt. Apx. 108 Stip. ¶ 89. Besides substantially limiting the number of positions subject to testing by adoption of these categories, Michigan's program significantly limits the number of random tests conducted in any one year; not to exceed fifteen percent (15%) of all test-designated positions. Pts. App. 40a Agreement, Art. 52, Sec. 3(b)(3).

2. Michigan's Program Parallels the Federal Government's Program.

The federal government's position on this issue is already well-known. The drug and alcohol testing program adopted by the Commission parallels the federal government's programs that have been in existence since 1986. Between 1986 and 1988, the federal government, through an Executive Order, established a random testing program for all federal employees in "sensitive positions." 6th Cir. Jt. Apx. 87-91 Stip. ¶¶ 11-24. In 1995, Congress adopted the Omnibus Transportation Employee Testing Act, 49 U.S.C. § 31306, (OTETA), which provided random testing for transportation "safety-sensitive" positions. 6th Cir. Jt. Apx. 89-90 Stip. ¶¶ 22-23. Starting in 1996, the Federal Bureau of Prisons has required random testing of all prison employees. 6th Cir. Jt. Apx. 90-91 Stip. ¶ 24.

The Commission also mandated protocols that coincide with those the federal government adopted for drug and alcohol testing. State Officials use the alcohol testing provisions of the OTETA "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" and the U.S. Department of Health and Human Services (HHS)"Mandatory Guidelines for Federal Workplace Drug Testing Programs." 6th Cir. Jt. Apx. 97, 99-100 Stip. ¶¶ 52-54; Pts. App. 40a-41a, Agreement Art. 52, § 4. The HHS drug guidelines reflect the "detectable levels that accurately determine if the employee has used the banned

drug" and require indirect monitoring of the collection process. 6th Cir. Jt. Apx. 97 Stip. ¶ 52.

3. Michigan's Program was Implemented After Rigorous Review of All Positions Nominated by State Officials.

The staff of the Michigan Office of State Employer (OSE) was charged with identifying through a rigorous process those positions that fit within the seven categories of duties. First, it asked the state agencies to nominate those positions whose duties satisfied one of the seven categories. 6th Cir. Jt. Apx. 101-102 Stip. ¶¶ 63-67; 466-467. Second, OSE required these entities to submit a position description for the nominated position or submit a composite position description for multiple positions that proves the position fit within one of these categories. 6th Cir. Jt. Apx. 102 Stip. ¶65; 468-469. Third, before rendering any decision, OSE compared the position descriptions with the criteria for test-designated status and reviewed the current random testing case law. 6th Cir. Jt. Apx. 103 Stip. ¶ 69; 402.

OSE submitted a preliminary list of 16,873 test-designated positions statewide, positions represented by various collective bargaining units or unrepresented. 6th Cir. Jt. Apx. 102 Stip. ¶ 68; 470-536 Stip. Exh. 29. Of the 16,873 state-wide positions, Petitioners represented 2,855 of those positions. Before the program was implemented, OSE met with Petitioners, provided them with the tentative list of test-designated positions they represented and described the process to determine the 2,855 test designated positions under Petitioners' auspices. 6th Cir. Jt. Apx. 103-104 Stip. ¶¶ 72-77; 106 Stip. ¶ 83, 545. OSE refused to designate for random testing 266 other positions represented by Petitioners that the state agencies nominated. 6 th Cir. Jt. Apx. 106 Stip. ¶ 83. Extensive training was provided to all state employees. Random testing began in March 2000. 6th Cir.Jt. Apx. 110 Stip. ¶ 94

4. State Officials Proffered A Significant Rationale to Support Random Testing

In the district court, the parties stipulated to the facts in lieu of trial. Ultimately, the parties stipulated to 170 paragraphs of facts and ten volumes of 56 exhibits. 6th Cir. Jt. Apx. 85-130; 316-1059. These stipulated facts and exhibits prove the special needs that warrant random testing instituted by the State of Michigan.

First, the State Officials selected categories of duties that implicated public safety concerns and then undertook a rigorous process designed to identify those positions that fit in the categories. Pet. App. 24a; 6th Cir. Jt. Apx. 101-108 Stip. ¶¶ 63-89; 466-693 Stip. Exhs. 27-41. For instance, the Michigan Constitution requires state officials to properly address the important public health and safety concerns of its citizens. Mich. Const. 1963, art. 4, § 51, art. 8, § 8. (6th Cir. Jt. Apx. 111 Stip. ¶¶ 100,102.) The Michigan Legislature also requires these officials to protect the general welfare and safety of the vulnerable populations these state agencies serve: Education - Mich. Comp. Laws §§ 393.51, *et seq,* 393.101 *et seq* (6th Cir. Jt. Apx. 112 Stip. ¶ 105); Parole and Probation Officers - Mich. Comp. Laws §§ 764.23, 791.204, 791.206 (4)(a), 791.236(4), 791.239 (6th Cir. Jt. Apx. 113 Stip. ¶¶ 111; 112; 114 ¶¶ 118-120; 1037, Stip. Ex. 50.); Health Professionals - Mich. Comp. Laws §§ 333.1101, 333.6107(3), 333.16167, 333.16170, 333.16221(b)(ii)-(iii), 333.16226 (6th Cir. Jt. Apx. 120-121 Stip. ¶¶ 145-151.) The State Officials have established policies to fulfill these responsibilities and to inform their employees of their role in fulfilling these goals. 6th Cir. Jt. Apx. 111 Stip. ¶¶101; 103-104 Stip. ¶¶ 72-77; 111-112 Stip. ¶¶ 100, 103-104, 107-108; 114 Stip. ¶¶121-122.

Second, each category covered by the State's program presents legitimate and important concerns regarding on-duty alcohol and drug abuse. Employees working in test-designated positions pose a significantly greater potential threat to the

health and safety of themselves and others and may be required to react to unusual or dangerous circumstances. Substantially greater consequences can occur from an error in their judgment or performance, and serious injury or death may be the result. Pet. App. 24a; 6th Cir. Jt. Apx. 401, Stip. Exh. 21.

Third, the selected employees knowingly have accepted careers in fields of highly regulated employment, which relate to safety *per se*. These employees may need special licenses to be eligible for such public employment. 6th Cir. Jt. Apx. 120-121 Stip. ¶¶ 145-152; 123 Stip. ¶ 162.

a. The Correctional Facility Setting Presents A Threat to the Safety and Security of Its Population and Fellow Employees

Over 80 percent of the prisoner population in the custody of the Department of Corrections (DOC) had a documented history of alcohol and drug abuse. 6th Cir. Jt. Apx. 1096-1097, Stip. Tr. of Kenneth McGinnis, DOC Director. The introduction of alcohol and drugs presents a severe threat to the safety and security of the persons present in the state's correctional, mental, and medical facilities serving the prisoners. *Id.*

DOC recorded positive drug results even for those persons within the confines of its correctional facilities or within its jurisdiction: prisoners (3.7%), parolees (22.9%), and probationers (26.9%). 6th Cir. Jt. Apx. 1029 Stip. Ex. 48. DOC needs to control introduction of drugs in correctional facilities by visitors, deliverers, and employees. 6th Cir. Jt. Apx. 1096-1097 Stip. Tr. McGinnis.

It is difficult to detect when and if an employee is using drugs; thus, they could present a harmful presence to a correctional facility or in the parole or probation settings. 6th Cir. Jt. Apx. 1166 Stip. Exh. 46 Stip. Aff. McGinnis. Every employee working in a prison setting makes hundreds of

decisions that could adversely impact the safety of those institutions. 6th Cir. Jt. Apx. 1094-1098 Stip. Tr. McGinnis. The ability to randomly test bestows another tool for interdiction of drugs into those environments. 6th Cir. Jt. Apx. 1096-1097 Stip. Tr. McGinnis.

History proves that employees who abuse substances are more susceptible to being compromised by prisoners and more likely to bring drugs into the work place. *Id.* Employees are warned in DOC training that prisoners, parolees, and probationers will attempt to gain their confidence or attempt to coerce them. 6th Cir. Jt. Apx. 1166 Stip. Tr. McGinnis. Parolees and probationers who introduce drugs and alcohol in the "free community" pose an even greater threat to the safety and security of the public. *Id.* The largest category of employees covered by the State's program work with parolees and probationers.

b. Parole and Probation Officers and Field Services Assistants Are Subject to Random Testing.

In the community, 1,132 Parole or Probation Officers and 25 Field Service Assistants supervise 55,000 probationers and 12,000 parolees. These employees are given law enforcement powers, use firearms, and have regular unsupervised access to parolees or probationers. 6th Cir. Jt. Apx. 114 Stip. ¶¶ 116, 118. Here, Petitioners do not challenge the testing of the 405 parole and probationer officers who have applied for and maintain their eligibility to carry firearms. 6th Cir. Jt. Apx. 116 Stip. ¶ 128.

All employees in these positions "certainly participate in a heavily regulated field." Pet. App. 31a; 6th Cir. Jt. Apx. 114-116 Stip. ¶¶ 116-128. These employees form an integral part of the state's law enforcement network and serve as an "arm" of the judiciary. All parole and probation officers have statutory law enforcement powers, including the ability to arrest offenders under Mich. Comp. Laws § 791.239. 6th Cir.

Jt. Apx. 114 Stip. ¶¶ 118-119; 1042 Stip. Exh. 50. For instance, drug trafficking can result in revocation of an offender's probation or parole status. Mich. Comp. Laws § 333.7401.

Probation and parole officers must contact their clients through home and work visits that often result in these employees spending several days away from the office and out of physical contact with a supervisor. 6th Cir. Jt. Apx. 1167 Stip. Exh. 46 Aff. McGinnis. Agents in the field also take random urine samples of the parolee or probationer with over 40% of such tests being positive. *Id.*; 1029 Stip. Exh. 48.

These employees might be easily compromised to overlook obvious parole or probation violations. 6th Cir. Jt. Apx. 1098-1099 Stip. Tr. McGinnis. Thus, their behavior, if not properly supervised, could impact the public safety of the community. *Id.*, 1130-1132.

Finally, these employees have shown periodic substance abuse in the past. *Id.*, 1133. Even after the testing program took effect and the employees were given notice they would be subject to random testing, two probation/parole officers tested positive for cocaine use. *Id.*

c. Non-Custodial Employees Working Within Perimeter of Correctional, Veterans, or Mental Health Facility Are Subject to Random Testing.

Within the perimeter of the state's correctional facilities, 674 incumbents in non-custodial positions have regular unsupervised access to and direct contact with prisoners. These incumbents work as corrections athletic coordinators, corrections program coordinators, institution chaplains, prison counselors, recreational therapists, special education teachers, dietician/nutritionists, state transitional professionals, corrections executives, employment counselors,

communications assistants, and general office assistants. 6th Cir. Jt. Apx. 116 Stip. ¶¶ 129-131.

These employees are responsible for interdiction of drugs and alcohol and are exposed to these substances in the prison. 6th Cir. Jt. Apx. 1096-1097, 1166 Stip. Tr. McGinnis. Incumbents in these test-designated positions are responsible for the general supervision of the prisoner population and the maintenance of safety and security of the institution to the best of their degree. *Id.* An employee's failure to do so could affect an escape or other harmful situations. *Id.* These non-custodial employees received additional training, which although less than that received by the custodial staff, exceeds that provided to incumbents in positions who have no contact with prisoners. *Id.*, 1103.

These employees have a duty to meet with prisoners often on a one-to-one basis behind closed doors. Such privacy, while essential to the assignment, also affords these employees the opportunity to pass prisoners controlled substances. *Id.* A correction officer is not normally present in the classroom. *Id.* These employees must control critical tools inventory, such as a pair of scissors that a prisoner could potentially use as a lethal weapon. *Id.*, 1097-1098, 1104.

Similarly, incumbents in 42 positions in the Department of Community Health (DCH) have unsupervised contact with prisoners. 6th Cir. Jt. Apx. 116-117 Stip. ¶¶ 130-131. These positions include chaplains, recreational therapists, music therapists, special education teachers, dietician/nutritionists, registered nurses, and certain word processing assistants. *Id.*, 117 Stip. ¶¶ 132-133. These employees provide direct services to prisoners and are responsible for maintaining safety and security within an institutional setting. 6th Cir. Jt. Apx. 111 Stip. ¶104.

d. State Health Care Positions Are Subject to Testing.

Approximately 452 DOC positions, which include registered nurses, clinical nurse specialists, and occupational therapists, provide direct health care services and unsupervised access to prisoners. 6th Cir. Jt. Apx. 119 Stip. ¶¶ 142-144; 121 Stip. ¶¶ 153-157; 640 Stip. Exh. 40. Approximately 172 DCH positions provide health care services to prisoners as registered nurses, clinical nurse specialists, occupational therapists, and physician assistants. 6th Cir. Jt. Apx. 121 Stip. ¶ 154; 640 Stip. Exh. 40. Another 174 test-designated positions provide counseling and psychological services to prisoners, including school psychologists and clinical and mental health social workers. 6th Cir. Jt. Apx. 122 Stip. ¶ 157.

Incumbents in these prison positions dispense and have access to medications such as codeine, morphine, amphetamines, and barbiturates. 6th Cir. Jt. Apx. 1088-1089 Stip. Tr. Gayle Lafferty, DOC Medical Director. They diagnose, treat, monitor, and observe patients without supervisory oversight. *Id.*, 1087-1088, 1093 Stip. Tr. Lafferty; 1166 Stip. Ex. 46 Aff. McGinnis. Incumbents in certain health care positions assist in invasive procedures such as surgeries or cerebral spinal fluid taps and use medical instruments such scalpels and syringes, which are deemed contraband in the wrong hands. 6th Cir. Jt. Apx. 1089-1090 Stip. Tr. Lafferty.

In DCH, 518 health care positions deliver similar medical services to mentally ill and developmentally disabled residents of state hospitals and institutions. 6th Cir. Jt. Apx. 122-123 Stip. ¶¶ 159-162; 640 Stip. Ex. 40. Fifteen health care positions provide care to 1000 veterans in two health care facilities under the jurisdiction of the Departments of Education and Military & Veterans Affairs. 6th Cir. Jt. Apx. 124 Stip. ¶164. One registered nurse position has been test-designated since its duties include delivery of health care to the clients of the

School for the Deaf and the Blind in Flint. 6th Cir. Jt. Apx. 123 Stip. ¶ 163.

It is clear that the special needs shown in this case are substantially more than a symbolic desire to project a public image.

5. Petitioners Have Limited Their Judicial Challenges.

By the actions taken in the lower courts, Petitioners waived their argument that the lower courts should have evaluated each position description and limited its complaint to a facial constitutional challenge. First, Petitioners agreed that the 2858 positions in question require performance of duties, in varying amounts, within one or more of the four challenged categories and thus, cannot argue at the appellate level that the lower courts failed to perform a sufficient evaluation of the chosen positions. Pet. App. 2a, n.2; 6th Cir. Jt. Apx. 108 ¶ 89. Petitioners made this stipulation after receipt of approximately seven boxes of documents, consisting of twenty-two binders of the position descriptions and job specifications for each of the 2,858 test-designated positions. 6th Cir. Jt. Apx. 106-109 ¶¶ 84-88. Thus, Petitioners abandoned their challenge that the program violated the Fourth Amendment as applied.

Second, Petitioners object to the program in question because allegedly no historical evidence exists of a drug or alcohol problem in the workplace. As early as 1990, Petitioners have opposed, as a matter of policy, the imposition of <u>any</u> random testing program in any employment environment except for those mandated by governmental regulations. 6th Cir. Jt. Apx. 320 Stip. Ex. 5. Here, Petitioners take an inconsistent position to their policy by agreeing that Michigan's civil service employees, who properly apply for and maintain their eligibility to carry firearms, may be subject to random testing. 6th Cir. Jt. Apx. 116 ¶ 128. No governmental regulation, however, mandates such testing.

Third, Petitioners assert that random testing for alcohol violates the Fourth Amendment. Early on the district court dismissed Petitioners' allegation that the score for a positive alcohol test rate was unconstitutional. Resp. App. 7b-8b. Petitioners never addressed their constitutional allegations on the alcohol testing until oral argument and only after the district court suggested Petitioners could still argue the claim. Petitioners, however, offered no evidence in support of its claims at the district court level and did not seriously contest this issue. The lower courts held constitutional the random alcohol testing program.

6. A History of Drug and Alcohol Abuse Existed in State Government Before Adoption of the Program.

The State Officials proffered a history of drug and alcohol abuse by employees working in State facilities. For instance, positive drug and alcohol results were occurring from tests required by federal law before the state developed this program. 6th Cir. Jt. Apx. 93 Stip. ¶ 35; 94 Stip. ¶ 42; 112 Stip. ¶ 109; 366 Stip. Exh. 13; 383-390 Stip. Exhs. 17, 18, 18a; 1029-1036 Stip. Exh. 48-50. The State Officials recounted incidents of classified employees, including teachers in the State's correctional facilities, either using drugs or alcohol or carrying them into state facilities. 6th Cir. Jt. Apx. 366 Stip. Ex. 13; 1032 Stip. Ex. 49. Employees, including those working in Petitioners' positions, such as registered nurses, forensic security aides, library assistants, word processor assistants, and trades inspectors, brought illegal substances into prisons or community health facilities. 6th Cir. Jt. Apx. 1032-1036 Stip. Exh. 49; 1064-1085 Stip. Ex. 16. Although this history cannot be characterized as a pervasive problem, the absence of such a degree of abuse does not defeat the program under the Fourth Amendment as suggested by Petitioners.

The State Officials, in cooperation with Petitioners, gave individual notice of the random test program to all classified employees. 6th Cir. Jt. Apx. 105 Stip. ¶ 80. Even after such

notice, positive test results continued to occur after the program was instituted. 6th Cir. Jt. Apx. 1025-1028 Stip. Exh. 44; 1032-1036 Stip. Exh. 49. Although Petitioners state that none of its members have been found "impaired," members who held parole/probation officer and nursing positions between 1999 and 2001 tested positive for drugs under random testing. 6th Cir. Jt. Apx. 119 Stip. ¶ 141; 122 Stip. ¶ 158; 1025-1028 Stip. Exh. 44. Probationer/parolee officers also have tested positive for alcohol use after reasonable suspicion existed. *Id.* Thus, drug and alcohol work related incidents by employees existed in the state agencies.

B. Michigan's Program was Held Constitutional by the Lower Courts.

Petitioners present a constitutional challenge "on its face" and not "as applied." Petitioners simply assert that the random nature of the testing violates the Fourth Amendment and the absence of a pervasive drug and alcohol abuse history does not justify a warrantless search.

After submission of 170 paragraphs of stipulated facts, 56 exhibits, and briefs in lieu of trial, the district court undertook the review warranted as a matter of law and ruled that the drug and alcohol testing program did not violate the Fourth Amendment. Pet. App. 18a. The district court dismissed Petitioners' argument that the absence of a particularized drug history warrants rejection of the program and stated that this Court has recognized that evidence of such a history is not essential. Pet. App. 27a-28a.

Against this backdrop, the district court critically evaluated the state's asserted needs. Pet. App. 24a-30a. The court found that the state's justification for random drug and alcohol testing is "much more akin to those presented in *Von Raab* [*Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)] than in *Chandler* [*Chandler v. Miller*, 520 U.S. 305 (1997)]." Pet. App. 38a. Further, the public safety concerns implicated

by the State's program are "much stronger than both those presented and found wanting in *Chandler* and those presented and found sufficient in *Earls* [*Pottawatomie County v. Earls*, 536 U.S. 822 (2002).]" Pet. App. 23a.

The district court balanced whether these special needs outweighed an individual employee's reasonable expectation of privacy, concluded that the employees clearly participated in heavily regulated industries, and found "the UAW did not seriously contest the proposition that employees in these positions have diminished expectations of privacy." Pet. App. 30a-33a. The fact that the state maintains confidentiality, established a sound medical review process, and provides for an administrative review process for any discipline imposed "militate[d] in favor of upholding the testing as being minimally intrusive." *Id.*, 33a.

The district court earlier dismissed Petitioners' challenge that State Officials improperly dismissed employees who tested positive on drug or alcohol tests. Resp. App. 7b-8b. Thus, no evidence on the record exists to support Petitioners' claim to this Court that the "State terminated those who tested positive for drugs and disciplined all of those who tested positive for alcohol." (Pt. Br. p 7.)

The United States Court of Appeals for the Sixth Circuit performed a similar review of the facts and analysis of the law. Pet. App. 2a–16a. The Sixth Circuit evaluated the state's asserted special needs for the program and its impact on the state classified civil service employees who are subject to testing "in their own unique context." *Id.*, 12a. It concluded that the state offered substantial special needs for the program even though a pervasive drug abuse problem did not exist among the test-designated positions. *Id.*, 13a. The Sixth Circuit also concluded that the state's special needs outweighed the employees' reasonable expectations of privacy noting that every position chosen dealt with a highly regulated industry

and that the character of the intrusion was not "highly intrusive." *Id.*, 14a-15a.

REASONS FOR DENYING THE WRIT

This case does not present any important question of federal law.

In this facial constitutional challenge, the Court of Appeals held that the random drug and alcohol program narrowly tailored by the State Officials did not violate the Fourth Amendment. The Court of Appeals found substantial needs existed to prevent harm to the vulnerable population under the state's jurisdiction, fellow state employees, and the tested employees who serve, care, and protect this population in highly regulated fields that overrides the intrusion upon the tested employees. Hence, the Court of Appeals comported with the law developed by this Court.

The absence of a history of a pervasive or particularized drug or alcohol abuse by the selected public sector employees does not vitiate the random testing program. Moreover, the random selection of employees subject to testing bolsters the deterrence and interdiction of drugs and alcohol in the vulnerable settings where the selected employees work. These conclusions adhere to this Court's holdings and do not create any conflict of law.

This Court should deny certiorari for these reasons.

I. This Court Has Upheld the Constitutionality of a Narrowly Tailored, Random Governmental Drug and Alcohol Testing Program that Serves the Compelling Needs of Protecting Public Safety, Even in the Absence of A Pervasive or Particularized History of Abuse.

Here, Petitioners present a facial constitutional challenge of the state's random testing program. Under such a challenge, a

party must prove "whether the test contemplated...can ever be conducted." *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 632-633, n. 10 (1989). To succeed, Petitioners had to "establish that no set of circumstances exists under which the [program] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge is the "most difficult challenge to mount successfully. *Id.* Petitioners failed to introduce any evidence to meet this burden.

A. The Random Program Does Not Violate the Fourth Amendment Since A Context-Based Inquiry Shows Substantial, and Not Merely Hypothetical, Public Safety Concerns that Outweigh the Diminished Expectation of Privacy for the Selected Employees.

1. There Are Substantial Public Safety Concerns.

The Fourth Amendment protects individuals against unreasonable searches and seizures. A government-ordered collection of testing of urine samples[2] is a search within the meaning of the Fourth Amendment for it represents an intrusion upon privacy rights. *Skinner,* 489 U.S. at 619; *Von Raab*, 489 U.S. at 665. This Court has never found that random testing violates the Fourth Amendment. The crucial word in the Fourth Amendment is "reasonable" and the decision whether a particular government program is reasonable "requires a judgmental, forward-looking, balance-striking, probabilistic assessment, rather than a conclusive demonstration of measurable harms certain to be inflicted if the program is struck down." *Dimeo v. Griffin*, 943 F.2d 679, 681 (7th Cir. 1991) (citing to *Von Raab*, 489 U.S. at 674.)

Sufficiently compelling circumstances, according to this Court, may exist to justify the private intrusions and permit drug and alcohol testing where the government seeks to prevent the development of, or to discover, latent or hidden

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[2] A breathalyzer test for alcohol , moreover, is even less intrusive than an urinalysis test for drugs. *Skinner,* 489 U.S. at 625.

hazardous conditions. *Earls*, 536 U.S. at 828 (citing *Von Raab,* 489 U.S. at 667-68.) See also *Skinner,* 489 U.S. at 634 (authorizing suspicionless alcohol testing.) For instance, this Court found the government's interest in regulating the conduct of railroad employees to ensure safety, "like its supervision of probationers, or regulated industries, or its operation of a government office, school, or prison, likewise presents 'special needs' beyond normal law enforcement that may justify the departures from the usual warrant and probable-cause requirements." *Skinner*, 489 U.S. at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-874 (1987).)

Earls extracted from prior decisions of this Court the elements necessary to perform a context-based analysis of whether a program violates the Fourth Amendment. *Earls,* 536 U.S. at 830-838. Here, the Court of Appeals engaged in the same factual analysis this Court has performed over the last 15 years and found the State Officials' random test program did not violate the Fourth Amendment. In doing so, the State Officials' invocation of special needs was not merely accepted, but rather the lower courts examined closely the interests advanced by the state as they related to the test-designated positions. Pet. App. 9a – 11a.

In this case, the situations and targeted groups covered by the test-designated categories are unique and discrete. Out of 60,977 state-wide positions, the State Officials chose 16,873 positions to be test-designated or 27% of the total positions available in the classified service. 6th Cir. Jt. Apx. 639 Stip. Ex. 39. Out of the 20,224 positions Petitioners represent, 2,855 positions or 14% were test-designated. *Id.* This designation only occurred after the Office of State Employer's staff painstakingly reviewed the position description and job classification for each position to determine if incumbents had to perform duties within any of the test-designated categories.

Each state agency, where the selected positions existed, had statutory missions to protect the public safety and security and

the vulnerable population they served. Thus, if the judgment of the incumbent could suffer from using drugs or alcohol, performance of the duties within each selected position was most susceptible to irreparable harm.

The parole or probation officers and field service assistants, the non-custodial employees who work within a prison perimeter, and the health care providers to those at-risk populations within the state's jurisdiction represent the crucial work force that fulfills the state's duties towards public safety and security. History has shown that 1) the introduction of alcohol and drugs into prisons presents a severe threat to its security and safety; 2) employees who are involved in substance abuse may be vulnerable to influence by others; and, 3) employees under the influence of drugs or alcohol suffer from diminished judgment that could impact their ability to perform duties, especially those requiring quick judgments, in a safe and secure manner. Pet. App. 10a.

State Officials had several experts evaluate the program. Dr. Donna Smith was instrumental in developing the drug and alcohol testing program mandated by the U.S. Department of Transportation (DOT), including being the principal author of DOT's final regulations for the program and working on the final work product for several other federal agency regulations, such as OTETA. 6th Cir. Jt. Apx. 236-237. These are the same regulations adopted by the State Officials for the program currently before this Court. She had the most first-hand knowledge about Michigan's program in her role as Senior Vice President of Substance Abuse Management, Inc.; an agency that provides Medical Review Officer and Third Party Administration services to over 5000 private and public sector employers, including Michigan. Dr. Smith concluded that the designated positions chosen were "consistent with the objectives of workplace safety, ensuring the quality of healthcare provided to the public, and fostering public confidence in public servants entrusted with the care and custody of at-risk populations." 6th Cir. Jt. Apx. 240-241.

2. The Selected Employees have a Diminished Expectation of Privacy and the Testing Intrusion is Minimal.

The selected employees who work in law enforcement, the medical profession, or inside a prison have long been a principal focus of regulatory concern. Thus, their expectations of privacy are diminished based upon the work they chose to perform. For instance, this Court in *Skinner,* 489 U.S. at 627, found that railroad employees were deemed to have diminished expectations of privacy because they participate in an industry pervasively regulated to ensure safety. In *Vernonia School Dist 47J v. Acton*, 515 U.S. 647, 657 (1995), student-athletes were deemed to be analogous to employees in a closely regulated industry since they have their own rules and regulations not applied to non-participating students. See also *Earls*, 536 U.S. at 833 (Applying the same reasoning to students participating in extracurricular activities.); *National Fed'n of Fed. Employees v. Cheney,* 884 F.2d 603, 612-613 (D.C. Cir., 1989) (Applying same reasoning to employment subject to a series of pre-employment screenings, including investigations into criminal, medical, employment, and educational histories, once hired, security personnel are subject to quarterly blood tests, annual medical examinations, annual criminal records checks, and periodic security investigations.); *Kemp v. Claiborne County Hosp.,* 763 F. Supp. 1362, 1368 (D. Miss., 1991) (Applying same rationale to health care employees.)

Moreover, the character of the testing intrusion is minimal and even less intrusive than the monitoring found by this Court in *Vernonia,* 515 U.S. at 658 as "negligible." In *Vernonia,* the male students produced samples at a urinal while observed from behind. Here, the regulations provides for indirect monitoring of the collection process unless evidence exists of sample tampering. 6th Cir. Jt. Apx. 99-100 Stip. ¶¶ 52, 54; Pet. App. 40a-41a. To limit the intrusion further, the State Officials

keep the test results confidential and do not turn over any results to any law enforcement agency. *Earls*, 536 U.S. at 848-849. This collection process is no different from the federal government process. 6th Cir. Jt. Apx. 258-263, 270 Dr. Ian MacDonald March 18, 2002 Report; 301, 304 Dr. Robert Willette March 14, 2002 Report. Hence, the intrusion here can be labeled as less than negligible.

In conclusion, this random testing program was instituted because sufficiently vital needs based on public safety concerns existed that outweighed the diminished expectation of privacy of the employees selected to be tested. The State Officials narrowly tailored and honed a program that assures the protections invoked under the Fourth Amendment.

B. Similar Random Testing of the Challenged Positions Has Been Held Constitutional by this Court and Other Federal Courts.

Before the State Officials even considered these programs, the federal courts had held constitutional random drug and alcohol testing for the duties within the four categories in question.

1. Public Sector Employees in Law Enforcement.

This Court, in *Skinner*, 489 U.S. at 619 and *Von Raab*, 489 U.S. at 670-671, recognized that persons in law enforcement may be subject to random testing. As noted, parolee and probation officers in this state perform law enforcement duties.

2. Public Sector Employees with Regular Unsupervised Access to and Direct Contact with Prisoners, Probationers or Parolees.

A concrete, and not merely hypothetical need, exists where drug interdiction is a necessary duty especially where an incumbent has regular, unsupervised access to, and direct

contact with prisoners, probationers, or parolees. *Von Raab*, 489 U.S. at 670-671. The possibility of blackmail or coercion by the prisoners is a valid concern to permit random drug testing, especially where employees have daily contact with prisoners. *Harmon v. Thornburgh,* 878 F.2d 484, 490-492 (Fed. Cir. 1989), *cert den, sub nom Bell v. Thornburgh*, 493 U.S. 1056 (1990). "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents special needs beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Griffin* 483 U.S. at 873-874. (This Court recognized supervision is necessary to ensure that probation restrictions are in fact observed and the community is not harmed by the probationer's at-large.) If incumbents in the parole and probation positions must assure this type of supervision, then surely a special need exists to warrant random testing of these incumbents.

Random testing on all employees working for a department of corrections could occur since such employees had regular access to the prisoners, a reasonable opportunity to smuggle drugs, and/or access to fire arms. *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989.) All Federal Bureau of Prison employees working within correctional institutions may be subject to random testing. *American Federal of Government Employees v. Roberts,* 9 F.3d 1464, 1468 (9th Cir. 1993). Federal probation and pretrial service officers are subject to similar testing. 6th Cir. Jt. Apx. 304 Dr. Robert Willette March 14, 2002 Report.

3. Public Sector Employees Who Provide Health Care Services.

Health care professionals can be subject to random testing because irremediable consequences result when an employee is not able to rectify his or her mistake and the coworkers of the employee have no opportunity to intervene before harm occurs.

Smith v. Fresno Irrigation District, 72 Cal. App.4th 147, Cal. Rptr.2d 775 (1999), *petition for rev. denied*, 1999 Cal. LEXIS 6066 (Cal. Aug. 25, 1999), citing *Kemp*, 763 F. Supp. at 1367 and *Harmon, supra*.

In *American Federation of Government Employees v Derwinski*, 777 F. Supp. 1493, 1499, (N.D. Cal. 1991), Veterans Administration health care staff had direct, active patient care in providing necessary diagnostic services, therapeutic care, or dissemination of drugs. Significantly, the Court permitted random testing and found that "[e]ven momentary lapses could cause serious consequences or at a minimum, if undiscerned, might subject a patient to procedures which would not have otherwise been indicated." *Id.* See also *Harmon*, 878 F.2d at 490, n. 8.

In *Pierce v. Smith*, 117 F.3d 866, 874, n. 9 (5th Cir. 1997), a medical resident could be subject to random testing where government extensively regulates the medical practice and even momentary lapses of attention can lead to disastrous consequences. Health care staff is not immune to drug abuse and the expectation of inquiry exists where the work depends on judgment and dexterity. See also *American Federation of Gov't Employees, AFL-CIO, Local 2391 v. Martin*, 969 F.2d 788 (9th Cir. 1992) (random testing permitted of nurses); *Kemp*, 763 F. Supp. at 1368 (random testing of staff preparing instruments and counting sponges.); *Plane v. United States*, 750 F. Supp. 1358, 1367-1368 (W.D. Mich. 1990) (random testing of nurses since they must "react swiftly", had access to medications, and diminished expectancy of privacy.)

Finally, the State Officials asked another expert, Donald Ian Macdonald, M.D., the former Director of the White House Drug Abuse Policy Office under President Ronald W. Reagan, to evaluate its program. Dr. Macdonald developed the initial phases of federal drug testing regulations to test federal safety-sensitive positions with the goal to protect an employee's privacy and eliminate the chances of a false positive. 6th Cir.

Jt. Apx. 245-250 Macdonald Resume. After reviewing the same objections Petitioners raise here, Dr. Macdonald concluded:

> The State of Michigan has designed a drug-free workplace program carefully patterned after the tested and proven federal model. The plaintiffs and their expert add nothing new to the objections that have been heard and rejected for the last 15 years. They do present data that is either dated, misleading, or false. [6th Cir. Jt. Apx. 270 March 18, 2002 Macdonald Report.]

In conclusion, the State Officials selected positions already found by the federal courts to be in compliance with the Fourth Amendment. Furthermore, the State Officials are implementing the same random testing as currently performed in the same positions in the federal government.

C. Michigan's Program Serves Significant Special Needs So It Is Constitutional, Even In the Absence of a History of Pervasive or Particularized Drug or Alcohol Abuse.

The State Officials did not need to wait until either a major accident occurred or evidence of massive drug use arose before implementation of a random testing program. This Court has recognized that government may take preemptive action to minimize the risks of a disaster: "the need to prevent and deter the substantial harm" provides the necessary immediacy for a random testing program and it would "make little sense" to wait for a substantial portion of the population tested to begin using drugs. *Earls*, 536 U.S. at 836.

The presence of abuse in the facilities in question would enhance the compelling needs the State Officials proved to warrant random testing. In *Chandler*, 520 U.S. 319, this Court rejected a suspicionless drug testing program established in

Georgia for any candidate for public office. Although finding the program unconstitutional, this Court acknowledged that a demonstrated problem of drug abuse, while not in all cases necessary, would "shore up an assertion of a special need for a suspicionless general search program." *Id.*

The lack of a history of drug abuse has not prevented the Court in the past from authorizing suspicionless drug testing. For instance, in *Von Raab,* 489 U.S. at 673, the Court upheld drug testing of custom officials on a purely preventive basis without any evidence of drug abuse problems. Even if such a requirement existed, the level of drug abuse that warranted constitutionality of a random drug test would be difficult to administer. *Id.* See also *Earls, supra.* The constitutionality of a program would be based upon a numerical formula; a process not previously adopted by the Court. Thus, the Court has never required a showing of a history of drug and alcohol abuse before finding a suspicionless testing program constitutional.

Here, the State Officials proffered ample evidence to show the compelling reasons for test-designating select positions. But the State Officials also showed that before adoption of this program, positive drug and alcohol results were being reported. The State Officials recounted incidents of classified employees, including teachers in the state's correctional facilities, either using drugs or alcohol or carrying them into state facilities. Employees, including those represented by Petitioners, such as forensic security aides, library assistants, word processor assistants, and trades inspectors, were bringing in illegal substances into the prisons or community health facilities.

Even after the State Officials gave advanced, individual notice of the random test program to all classified employees, positive tests continued to occur. Petitioners state that none of its members have been found "impaired at work," but their members who held parole/probation officer and nursing positions between 1999 and 2001 tested positive for drugs

under the random testing.[3] Probationer/parolee officers also tested positive for alcohol.

Thus, drug and alcohol work related incidents have existed in the state agencies subject to this suit. Even though a history of drug and alcohol abuse in the selected positions is not mandated to pass constitutional muster, the positive results in test-designated positions before and after implementing the random test program "shore up" the compelling needs shown for such testing today.

D. The Randomness of the Selection Process Represents an Effective Deterrent and in the Presence of Notice Prior to its Implementation, Does Not Unconstitutionally Infringe on the Selected Employee's Privacy.

The random testing program adopted in this case permits only 15% of the total test-designated positions to be tested in a year. This percentage does not demonstrate an unrelenting scrutiny or an unsettling show of authority infringing upon the Fourth Amendment Rights of the tested employees.

Here, Petitioners state as a matter of law that the random nature of the program requires more proof of compelling interests to outweigh the acknowledged invasion of privacy. (Pt. Br. pp 21-22.) No court has required such quantity of evidence. But even if such was the law, the State Officials would satisfy it.

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[3] Petitioners' expert, Dr. John Morgan, belittled the fact that the majority of positives show marijuana use. (Pt. Br. p 3.) Dr. Morgan's membership in NORML, an organization whose mission is to legalize marijuana, reflects his political agenda in criticizing Michigan's program. 6th Cir. Jt. Apx. 263-264 Macdonald March 18, 2002 Report. This Court, however, previously recognized that marijuana has mental and physical impacts on judgment and reaction time. *Vernonia*, 515 U.S. at 663.

In *Chandler,* 520 U.S. at 320, this Court rejected drug testing of potential candidates since the scheme was not a credible means to deter illicit drug users from seeking office where the candidate chose the date, time, and location of the test. On the other hand, this Court, in *Von Raab,* 489 U.S. at 676-677, approved a program where the applicant did not know when testing would occur.

Here, all classified employees, even those not subject to random testing, received notice and training on the program. Any surprise that an employee is subject to testing is substantially reduced because of this advance notice.

Moreover, the evidence showed that the random testing is an effective deterrent. Pet. App. 29a. As Dr. Macdonald stated, knowledge of a potential random test may be the most useful and strongest deterrent to substance abuse, especially if performed often enough. 6th Cir. Jt. Apx. 270 March 18, 2002 Macdonald Report.

A "definite sign that the program is working" can be proven by the 74% decline in positive test results in the national workplace. *Id.*, 256-257; Pet. App. 29a. Aware of the state's low positive rates, Dr. Macdonald noted that the rate for air traffic controllers and pilots is even lower, but such rates should not lead a "sensible person" to stop the testing of those "key personnel." 6th Cir. Jt. Apx. 257 Macdonald March 18, 2002 Report.

Random testing is an effective deterrent. *Id.*, 258; Pet. App. 29a. Knowledge of a potential random test may be the strongest deterrent to substance abuse, especially if performed often enough. Pet. App. 30a; 6th Cir. Jt. Apx. 258 MacDonald March 18, 2002 Report. See *Smith,* 72 Cal App. 4th at 162. "While it is true that random testing may increase employee anxiety and the invasion of the subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence. *American*

Federation of Government Employees v. Skinner, 885 F.2d 884, 890 (D.C.Cir. 1989). Michigan's program represents an effective deterrent and does not violate the Fourth Amendment.

II. No Conflict Exists Amongst the Circuit Courts or the States to Warrant Review by this Court.

The Arizona Supreme Court, in *Petersen v. City of Mesa*, 207 Ariz. 35, 83 P.3d 35 (2004*), cert denied*, _U.S._, 125 S. Ct. 51 (2004), rejected random testing of firefighters and despite Petitioners' reliance, this case is readily distinguished. First and foremost, a dearth of evidence existed, not only of a history of drug use, but also of the city's reasons for adopting random testing and its perceived need to conduct such testing in the first instance. *Petersen*, 207 Ariz. at 39, 83 P.3d at 39.

Second, Arizona found this Court's decisions in *Earls, supra,* and *Von Raab, supra,* distinguishable since firefighters had day-to-day scrutiny typical of the traditional work setting. The firefighters also did not work in the direct interdiction of drugs, did not carry firearms, and had no notice that they would be subject to testing. *Petersen,* 207 Ariz. at 40, 83 P.3d at 40. In this case, Petitioners stipulated that all the employees in positions selected for random testing in this case must interdict drugs, work in highly regulated industry or profession, may carry firearms, and/or are unsupervised when with their clients.

Third, Petitioners state that firefighters face more danger than the employees at issue here. The amount of danger the employees face does not warrant the random testing; it is the vulnerable populations they serve, the serious, irreparable harm that can occur by their acts, and the statutory agency missions they must fulfill.

Although the Supreme Court of Arizona applied federal law for the Fourth Amendment, it found persuasive the Alaska Supreme Court's reasoning in *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage,* 24 P.3d 547,

557-58 (Alaska 2001) that random versus scheduled tests intrusively infringe upon the privacy rights of the employee. *Petersen,* 207 Ariz. at 39, 83 P.3d at 39. The Supreme Court of Alaska, however, applied Alaska's constitutional provision to the right of privacy, and not the U.S. Fourth Amendment, but in doing so stated that a history of substance abuse problems is not invariably necessary. *Anchorage*, 24 P.3d at 549, 556. Thus, neither the *Anchorage* nor the *Petersen* cases can be used to support Petitioners' contention that the U.S. Fourth Amendment only permits selected versus random testing. (Pt. Br. p 20.) Petitioners' claim that these cases require a showing of a history of drug abuse is not availing. (Pt. Br. pp 14 – 15.)

The Fifth and Tenth Circuit Court of Appeal decisions on the constitutionality of random testing, in the absence of a history of drug abuse, do not conflict. (Pt. Br. pp 15 – 17.) The Fifth Circuit Court of Appeals issued two decisions on random testing of school staff: *United Teachers v. School Bd through Holmes,* 142 F. 3d 853 (5th Cir. 1998) and *Aubrey v. School Board of Lafayette Parish,* 148 F.3d 559 (5th Cir. 1998.) Unlike here, the only issue addressed in *United Teachers, supra,* was whether to enjoin a program automatically testing every employee who incurred a work-related injury no matter who was responsible for the injury. An injunction issued due to the broad reach of the testing and the lack of evidence of a history of drug abuse. Although the question was not before it, the court stated that heavy weight would be given to the special need balance if it related to teachers as role models and to whom children are entrusted. *United Teachers,* 142 F. 3d at 856.

Subsequently, in *Aubrey,* 148 F.3d at 564, the Court of Appeals for the Fifth Circuit approved random testing of a public school custodian because he has access to student and handled dangerous machinery and hazardous substance. Unlike in *United Teachers,* the *Aubrey* panel, 149 F.3d at 563, found evidence to show special interests to warrant such testing and thus, drug abuse or use in the schools, although being

persuasive, was not mandatory. *Id.* Thus, no conflict exists between these two cases: the *United Teachers* panel in the absence of evidence of a special interest, turned for evidence of a history of drug use was proven, while the *Aubrey* panel with substantial evidence of a compelling need, found evidence of drug abuse unnecessary.[4]

Likewise, the Court of Appeals of the Tenth Circuit, in *19 Solid Waste Dep't Mechanics v. City of Albuquerque,* 156 F.3d 1068, 1075-1076 (10th Cir. 1998), struck down random testing of solid waste employees absent facts of a public interest. The court, however, noted that a history of drug abuse was not a prerequisite. Petitioners inaccurately described Judge Briscoe's statements in his concurrence where he stated the absence of any showing of a history of drug abuse "may not always be necessary." *Id.,* 156 F.3d at 1075. (Pt. Br. p 16.) Thus, the Court of Appeals decision below is not in conflict with the Tenth Circuit Court of Appeals.

The Court of Appeals decision below also does not conflict with the decisions out of Colorado, Ohio, or Massachusetts. (Pt. Br. 16, 17, n. 5.) In *Timm v. Reitz*, 39 P.3d 1252, 1256 (Colo. Ct. App. 2001), the Colorado Court of Appeals struck down the random testing of trainers of greyhound dogs due to disputed or insufficient evidence to support the government's asserted rationales. In *Timm,* 39 P.3d at 1258, the court noted that historical evidence of harm or abuse was not mandated. Moreover, it recognized that this Court, in *Von Raab,* 489 U.S. at 674, did not require evidence of a history of abuse where a compelling interest justified the drug testing program.

In *State ex rel Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation,* 97 Ohio St. 3d 504, 512, 780 N.E.2d 971, 990 (2002), *recon. denied*, 98 Ohio St. 3d 1401 (2003), the Ohio

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[4] The dissenting judge in *Aubrey* did not require a drug history, but looked for one after finding the special need asserted was not similar in magnitude to those approved in other cases. *Aubrey*, 148 F.3d at 567, 569-570.

Supreme Court struck down a test program for any employee sustaining work-related injury in Ohio. This decision adheres to this Court's requisite evidence to sustain suspicionless testing: a history of abuse, a unique position, or the potential for creating risks of catastrophe in the workplace. *Id.*

Petitioners relied on *Guiney v. Police Comm'r of Boston,* 411 Mass. 328, 582 N.E.2d 523 (1991) where the Supreme Court of Massachusetts found that in the absence of facts showing a substantial public need the random testing of police and firefighters violated the Massachusetts' Constitution. (Pt. Br. p 17, n. 5.) The court, however, noted its previous ruling that a random testing program for employees who carry firearms or participate in drug interdiction is constitutional under the U.S. Fourth Amendment. *Guiney,* 411 Mass. at 328, 582 N.E.2d at 523 citing to *Guiney v. Roache,* 873 F.2d 1557, 1558 (1st Cir.), *cert. den*ied, 493 U.S. 963 (1989).

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: March 2005

APPENDIX

Opinion of United States District Court,
Docket No. 5:00-CV-21, 2001 U.S. Dist. LEXIS 4560
(March 30, 2001).....1b-15b

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. 5:00-CV-21

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its Affiliated Local 6000,
Plaintiffs,

v

Janine Winters, James Haveman, William Martin, Arthur Ellis, Major General E. Gordon Stump, and Douglas Howard, in their official capacities, jointly and severally,
Defendants.

Decided and Filed: March 30, 2001

OPINION

Before: McKEAGUE, District Judge

Plaintiffs International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), and its Affiliated Local 6000 (collectively referred to as "UAW"), are labor organizations. In this action, they represent certain State of Michigan employees allegedly affected by random drug and alcohol testing requirements imposed by the Michigan Civil Service [*2] Commission in the 1999-2001 collective bargaining contract between the UAW and the Office of the State Employer. In their four-count first amended complaint, asserting civil rights claims under *42*

U.S.C. 42 U.S.C. § 1983, plaintiffs challenge the drug and alcohol testing requirements as violative of employees' Fourth Amendment privacy and Fourteenth Amendment due process rights. Named as defendants are the directors of departments of state government who have authority to implement the subject drug and alcohol testing policies: Janine Winters, Director of the State Employer; James Haveman, Director of the Michigan Department of Community Health; William Martin, Director of the Michigan Department of Corrections; Arthur Ellis, Superintendent of Public Instruction; Major General E. Gordon Stump, Director of the Michigan Department of Military and Veterans Affairs; and Douglas Howard, Director of the Family Independence Agency. Plaintiffs seek declaratory and injunctive relief, as well as attorney fees.

Now before the Court is defendants' motion to dismiss the complaint in its entirety. Defendants contend that plaintiffs lack standing, that there is no ripe case or controversy, [*3] that this Court should abstain, and that, in any event, plaintiffs have failed to state a claim upon which relief can be granted.

I. PLAINTIFFS' COMPLAINT

Article 52, in its present form, was included in the collective bargaining contract by the Michigan Civil Service Commission over the UAW's objection. Article 52 allows the employer to require "test-designated employees" to submit to random drug testing or alcohol testing. Among the seven categories of positions defined as "test-designated positions" are four categories of positions occupied by employees who are represented by plaintiffs:

....

> (2) A position in which the incumbent possesses law enforcement powers or is required or permitted to carry a firearm while on duty.

> (3) A position in which the incumbent, on a regular basis, provides direct health care services to persons in the care or custody of the state or one of its political subdivisions.
>
> (4) A position in which the incumbent has regular unsupervised access to and direct contact with prisoners, probationers, or parolees.
>
> (5) A position in which the incumbent has unsupervised access to controlled substances.
>
> ....

Collective [*4] Bargaining Contract, Art. 52, § 1(g). Since random testing was implemented on March 1, 2000, until August 22, 2000, when plaintiffs' first amended complaint was filed, plaintiffs allege 235 UAW-represented employees had been subjected to a random drug test or alcohol test. In count one of the complaint, plaintiffs allege the random, suspicionless drug and alcohol tests constitute unreasonable searches and seizures in violation of Fourth Amendment privacy rights.

Section 5 of Article 52 provides that a positive alcohol test indicating a breath alcohol concentration equal to or greater than 0.02 shall constitute just cause for the employer to discipline an employee. Although plaintiffs have not alleged that any represented employee has been subject to discipline under this provision, they alleged in count two that the threat of discipline constitutes an unreasonable search and seizure and deprives represented employees of property without due process.

In count three, plaintiffs challenge the "reasonable suspicion testing" provision of Article 52, § 3. It requires employees "to

submit to a drug test or an alcohol test if there is reasonable suspicion that the employee has violated [*5] this article." Plaintiffs contend "reasonable suspicion" is defined so broadly or vaguely as to allow supervisor abuse and harassment of disfavored employees. n1 Again, plaintiffs do not allege that any represented employee has been subject to unfair treatment, or any discipline at all, under the reasonable suspicion provision. Yet, they allege the threat of enforcement infringes their Fourth Amendment privacy rights.

n1 Reasonable suspicion" is defined in § 1(e) of Article 52 as follows:

> Reasonable suspicion means a belief, drawn from specific objective facts and reasonable inferences drawn from those facts in light of experience, that an employee is using or may have used drugs or alcohol in violation of a departmental work rule or a civil service rule or regulation. By way of example only, reasonable suspicion may be based upon any of the following:
>
> (1) Observable phenomena, such as direct observation of drug or alcohol use or the physical symptoms or manifestations of being impaired by, or under the influence of, a drug or alcohol.
>
> (2) A report of on-duty or sufficiently recent off-duty drug or alcohol use provided by a credible source.
>
> (3) Evidence that an individual has tampered with a drug test or alcohol test during employment with the State of Michigan.

> (4) Evidence that an employee is involved in the use, possession, sale, solicitation, or transfer of drugs or alcohol while on duty, while on the employer's premises, or while operating the employer's vehicle, machinery, or equipment.

[*6]

Count four is addressed to "follow-up testing" requirements under § 3(a)(3) of Article 52:

> Follow-up testing. An employee shall submit to an unscheduled follow-up drug test or alcohol test if, within the previous 24-month period, the employee voluntarily disclosed drug or alcohol problems, entered into or completed a rehabilitation program for drug or alcohol abuse, failed or refused a Preappointment drug test, or was disciplined for violating this rule.

Plaintiffs allege the threat of enforcement of such onerous follow-up testing violates represented employees' Fourth Amendment privacy rights and deprives them of property without due process.

II. REPRESENTATIONAL STANDING

In moving to dismiss the complaint, defendants first challenge the UAW's standing to enforce personal civil rights under *42 U.S.C. § 1983.* This issue is controlled by *Knox County Educ. Association v. Knox County Bd. of Educ., 158 F.3d 361, 379 n.24 (6th Cir. 1998),* where the Sixth Circuit observed that " [HN1] a union does have representational standing to challenge the constitutionality of an alcohol and drug testing policy on behalf of its members." Accordingly, [*7] the Court rejects defendants' standing argument.

III. SUBJECT MATTER JURISDICTION

A. Ripeness

Even if plaintiffs might be deemed to generally have representational standing to invoke the Court's jurisdiction, defendants contend the Court lacks subject matter jurisdiction over the claims asserted in counts two, three and four because they are not "ripe." In counts two, three and four, plaintiffs complain of the "threat" posed by Article 52 discipline, reasonable suspicion, and follow-up testing provisions. Because plaintiffs have failed to name any represented employee who has actually been subject to discipline or testing under any of these provisions, defendants contend the UAW's claims are premature.

The UAW's representational standing "does not eliminate or attenuate the constitutional requirement of a case or controversy." *Warth v. Seldin, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).* In order to satisfy the case or controversy requirement, the UAW "must allege that its members, or any one of them, are suffering *immediate or threatened injury* as a result of the challenged action of the sort that would make out a justiciable case had **[*8]** the members themselves brought suit." *Id. at 511* (emphasis added). If a claim is not ripe for review, then there is no actual case or controversy and the Court lacks subject matter jurisdiction. *Dixie Fuel Co. v. Comm'r of Social Security, 171 F.3d 1052, 1057 (6th Cir. 1999); Bigelow v. Michigan Dep't of Natural Resources, 970 F.2d 154, 157 (6th Cir. 1992).* Ripeness requires that the injury in fact be "certainly impending." *National Rifle Ass'n of America v. Magaw, 132 F.3d 272, 280 (6th Cir. 1997).* "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *Id.*

The Supreme Court defined the purpose of the ripeness doctrine as follows:

> Its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties. The problem is best **[*9]** seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). See also Dixie Fuel, 171 F.3d at 1057 (stating that the ripeness determination requires consideration of fitness for judicial decision and hardship to the challenging party).

In response to defendants' ripeness challenge, plaintiffs have failed to demonstrate that the claims asserted in counts two and three are ripe. n2 In connection with count two, plaintiffs have not alleged that any represented employee has been subject to discipline, unfair or otherwise, for having had a breath alcohol concentration equal to or grater than 0.02. Absent the imposition of some sort of discipline, plaintiffs are unable to allege an actual injury cognizable as a violation of privacy or due process rights. The mere possibility of discipline is insufficient to render the claim justiciable -- especially where the nature of the discipline that might be imposed is left to the discretion of the employer. **[*10]** Only when the nature of the infraction and the discipline are defined can the reasonableness of any resulting invasion of privacy or deprivation of property be evaluated. In other words, until discipline is imposed, there is no injury in fact that poses a claim fit for judicial decision. Neither can the mere threat, the hypothetical possibility, that unreasonable discipline *might* be imposed for a technical violation of the 0.02 standard be deemed to result in the sort of

hardship to plaintiffs' members as might render the count two claim justiciable.

> n2 Plaintiffs' response to the ripeness challenge is limited to their count one claim, as they argue that random drug and alcohol testing has commenced and is presently infringing members' privacy rights. Defendants do not contest the ripeness of count one.

The same analysis applies with equal force to plaintiffs' count three claim challenging the "reasonable suspicion testing" authorized by Article 52. The mere possibility that a supervisor may abuse the discretion **[*11]** inherent in determining the reasonableness of suspicion -- despite the limitations imposed by the Article 52 definition of reasonable suspicion, and despite the additional requirements that reasonable suspicion testing be first documented and approved by the drug and alcohol testing coordinator (see Article 52, § 3(b)(4)) -- is insufficient to confer ripeness. Absent an alleged instance of enforcement and an actual injury (in the form of an allegedly unreasonable search), plaintiffs' count three claim fails to satisfy both the "fitness" and the "hardship" elements of ripeness.

Count four challenges the Article 52 follow-up testing provision. This provision requires any covered employee -- not just those in test-designated positions -- to submit to unscheduled drug or alcohol testing (not more than six times per year) for a period of two years after any of the following occurrences: (a) the employee's voluntary disclosure of drug or alcohol problems; (b) the employee's entry into or completion of a drug or alcohol abuse rehabilitation program; (c) the employee's failure or refusal to submit to a preappointment drug test (a prerequisite to appointment to a test-designated position); **[*12]** or (d) the employee's having been disciplined for violating any provision of Article 52.

This provision is undisputedly in effect currently, although plaintiffs have failed to name any represented employee specifically impacted by it. It purports, on its face, to apply

automatically on the occurrence of any one of the listed events. That is, its requirement that the employee submit to unscheduled drug and alcohol testing is not triggered by or otherwise dependant on the exercise of the employer's discretion. Plaintiffs' count four claim, to the extent it rests on Fourth Amendment privacy interests, thus presents a "cleaner" legal question which appears not to require a fuller factual development than is now available to enable fair and effective judicial review. Moreover, inasmuch as the present threat of follow-up testing may work to deter represented employees from addressing their drug or alcohol problems in a rehabilitation program, it may pose hardship if judicial review is denied. For these reasons, the Court concludes that plaintiffs' count four claim for violation of Fourth Amendment privacy rights is ripe and does present an actual case or controversy.

The same cannot be **[*13]** said, however, of the count four due process claim. This claim has not been well defined. Plaintiffs appear to assert a protected property interest in continued employment. To the extent that discharge from employment represents a *potential* penalty for violation of the follow-up testing requirement, plaintiffs apparently allege that its enforcement threatens their members with loss of employment under circumstances that *could* constitute a denial of procedural and/or substantive due process. This mere possibility of discharge under improper circumstances, clearly, is not an actual injury, but a hypothetical one. No injury in fact is "certainly impending." It follows that plaintiffs' count four due process claim is not justiciable.

In sum, then, only the claims contained in counts one and four, asserting privacy interests, survive defendants' ripeness challenge. The claims contained in counts two, three and four, to the extent count four asserts a due process claim, will be dismissed for lack of a justiciable case or controversy.

B. *Rooker-Feldman* Doctrine

Defendants also contend the Court lacks jurisdiction over this matter under the *Rooker-Feldman* Doctrine. **[*14]** The

Rooker-Feldman Doctrine is the product of two Supreme Court decisions, *Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923),* and *District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983).* These rulings [HN4] combine principles of abstention and res judicata and stand for the proposition that the inferior federal courts lack jurisdiction to review a state court decision of an adjudicatory nature. *United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995).* A party raising a federal question already litigated in state court must appeal the state court decision through the state system and then directly to the United States Supreme Court. *Id.*

Here, defendants have not identified any prior state court decision or proceeding that is implicated by plaintiffs' claims. Defendants' creative efforts to cast the Civil Service Commission's adoption of Article 52 as a state court proceeding or as being adjudicatory in nature are unavailing. The Civil Service Commission's adoption and imposition of the Article 52 clearly represents the discharge of an administrative function. **[*15]** Therefore, *Rooker-Feldman* does not bar this Court's review of the instant claims.

IV. ABSTENTION

Defendants also ask the Court to abstain from exercising jurisdiction for prudential reasons. First, they contend the Court should abstain under *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971),* and its progeny. [HN5] Pursuant to *Younger*, and succeeding cases, it is generally recognized that federal courts must, out of comity and federalism concerns, refrain from enjoining pending state criminal proceedings, as well as pending state civil or administrative proceedings in which important state interests are involved. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 626-28, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986).* *Younger* abstention has never been extended, however, to encompass state proceedings that are not "judicial in nature." *New Orleans Public Service, Inc. v. Council of City of New*

Orleans, 491 U.S. 350, 369-70, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989).

Younger abstention has no application in the present case, because again, defendants have not identified any *pending* **[*16]** state proceeding of a judicial nature. The mere fact that plaintiffs might have sought state judicial review of the Civil Service Commission's administrative action does not foreclose federal court review of plaintiffs' § 1983 claims. *See Ohio Civil Rights Comm'n, 477 U.S. at 627 n.2.*

Defendants next contend the Court should abstain pursuant to *Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943).* [HN6] The Supreme Court has defined the applicability of *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, 491 U.S. at 361, quoting **[*17]** *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976).*

Here, it appears that plaintiffs could have sought state court review of the Civil Service Commission's action. However, no questions of state law are implicated by plaintiffs' § 1983 claims. Neither does the Civil Service Commission's regulation of the conditions of state employment pose the sort of complex regulatory scheme governing distinctively local concerns that would warrant abstention. " [HN7] While *Burford* abstention is concerned with protecting complex state administrative

processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *New Orleans Public Service, 491 U.S. at 362.* Clearly, the constitutionality of the Article 52 drug and alcohol testing provisions can be assessed without unduly disrupting state efforts to establish a coherent policy. [HN8] Abstention is not required "merely because resolution of a federal question may result in the overturning of a state policy." *Id. at 363,* **[*18]** quoting *Zablocki v. Redhail, 434 U.S. 374, 380 n.5, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978).*

Accordingly, defendants' request that the Court abstain from exercising jurisdiction is denied.

V. VALIDITY OF CLAIMS

Defendants contend plaintiffs' complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6).* [HN9] Defendants' motion under Rule 12(b)(6) tests the legal sufficiency of the complaint. The Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the plaintiffs. *Forest v. United States Postal Service, 97 F.3d 137, 139 (6th Cir. 1996).* The Court is not, however, required to accept summary allegations or unwarranted legal conclusions. *Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999).* Dismissal is appropriate only if it appears beyond doubt that plaintiffs can prove no set of facts consistent with their allegations that would entitle them to relief. *Id.*

The parties acknowledge that the viability of plaintiffs' Fourth Amendment claims is determined with reference to the Supreme Court's ruling in *Chandler v. Miller, 520 U.S. 305, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1997).* **[*19]** In *Chandler,* the court recognized that [HN10] drug and alcohol testing of employees "intrudes upon expectations of privacy that society has long recognized as reasonable." *Id. at 313,* quoting *Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617, 103 L.*

Ed. 2d 639, 109 S. Ct. 1402 (1989). Government-ordered intrusions of this type are "searches" under the Fourth Amendment and must therefore be "reasonable" to satisfy constitutional muster. *Chandler, 520 U.S. at 313.* Ordinarily, such searches must be based on individualized suspecion of wrongdoing to be reasonable. *Id.* However, particularized exceptions have been recognized based on "special needs, beyond the normal need of law enforcement." *Id.*, quoting *Skinner, 489 U.S. at 619.*

Defendants contend the drug and alcohol testing required under Article 52 is justified by such "special needs." Defendants argue that suspicionless random testing is authorized on a carefully tailored basis only for test-designated positions, the duties of which pose significant health and safety concerns (i.e., employees who are required or permitted to carry a firearm; employees **[*20]** who provide direct health care to persons in the care or custody of the state; employees who have regular unsupervised contact with prisoners, probationers or parolees; and employees who have unsupervised access to controlled substances); and for employees with a documented history of drug or alcohol problems or drug or alcohol testing problems.

Defendants' proffered "special needs" may ultimately be deemed to justify the testing authorized by Article 52, but they do not warrant dismissal of plaintiffs' surviving claims at this stage. [HN11] As the Supreme Court has recently made clear, it is not for the Court to "simply accept the state's invocation of a 'special need.'" *Ferguson v. City of Charleston, 528 U.S. 1187, 120 S. Ct. 1263, 146 L. Ed. 2d 98, 2001 WL 273220* *6 (U.S. 2001). Rather, the Court must undertake a "close review" of the scheme at issue and "all available evidence," *id.* at *6-7, to determine whether the proffered special need is "substantial -- important enough to override the individual's acknowledged privacy interest." *Chandler, 520 U.S. at 318.* The Court "must undertake a context-specific inquiry, examining closely the competing private and **[*21]** public interests advanced by the

parties." *Id. at 314. See also Knox County Education Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 373 (6th Cir. 1998).*

In deciding defendants' Rule 12(b)(6) motion, the Court assesses the facial sufficiency of the complaint and views the allegations in the light most favorable to the plaintiffs. Evaluating plaintiffs' allegations under the standards established in *Chandler*, the Court can hardly hold that plaintiffs can prove no set of facts consistent with their allegations that would entitle them to relief. Defendants' Rule 12(b)(6) motion is simply not the appropriate vehicle for evaluating the constitutionality of Article 52 as a matter of law. The Court can undertake the required context-specific inquiry, closely examining the competing private and public interests involved, only after the record has been developed. Then, defendants' motion can be renewed as one for summary judgment under *Fed. R. Civ. P.56.*

Accordingly, defendants' motion to dismiss plaintiffs' remaining Fourth Amendment claims for failure to state a valid claim will be denied. An order consistent with this opinion shall issue forthwith. **[*22]**

Dated: March 30, 2001

DAVID W. McKEAGUE

UNITED STATES DISTRICT JUDGE

ORDER OF PARTIAL DISMISSAL

In accordance with the Court's written opinion of even date,

IT IS HEREBY ORDERED that defendants' motion to dismiss is **GRANTED** in part and **DENIED** in part; and

IT IS FURTHER ORDERED that the claims asserted in counts two and three of plaintiffs' first amended complaint, as well as the claim for deprivation of property without due process asserted in count four, are **DISMISSED** for lack of justiciability; and

IT IS FURTHER ORDERED that defendants' motion to dismiss is, with respect to the Fourth Amendment claims asserted in counts one and four, **DENIED**.

Dated: March 30, 2001

DAVID W. McKEAGUE

UNITED STATES DISTRICT JUDGE